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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole, and
DIOCESE OF FORT WAYNE - SOUTH BEND, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdiction over and adjudicating disputes between the Catholic Bishop of Chicago and the lay faculty employed by the Catholic Bishop at two minor seminaries that exist to educate and train the clergy of the Roman Catholic Church.

II.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdistion over and adjudicating disputes between the Diocese of Fort Wayne-South Bend, Inc. and the lay faculty employed at five Catholic diocesan high schools in the Diocese.

STATEMENT

Petitioner National Labor Relations Board ("the Board") seeks to bring two related but different cases before the Court. The Board's action against Respondent Catholic Bishop of Chicago, the first case, concerns the Board's assertion of jurisdiction over two minor seminaries in the Archdiocese of Chicago, Quigley Preparatory Seminary North and Quigley Preparatory Seminary South. (Tr. 168-69)[1] Minor seminaries are special high schools that prepare young men for the Roman Catholic priesthood. Upon graduation from a minor seminary, the candidate for the priesthood continues his training at a seminary college and a theological school. There are 87 minor seminaries in the United States. (Tr. 169 *et seq.*)

The second case concerns the Board's assertion of jurisdiction over five diocesan high schools administered by Respondent Diocese of Fort Wayne-South Bend, Inc. in Indiana. These schools, unlike the Quigleys, are not devoted to education for the priesthood. But, like the Quigleys, the essential reason for their existence is to nurture

[1] "Tr." refers to the transcript of the Quigley representation proceeding before the Board. "FW Tr." refers to the transcript of the Fort Wayne representation proceeding before the Board.

and advance the principles of Roman Catholicism. (FW Tr. at 56-57)

Over Respondents' objections that the Board's assertion of jurisdiction over their religious schools violated the First Amendment, representation elections were held at the Quigleys and in the Fort Wayne-South Bend diocesan high schools in September and October, 1975. (Cert. Pet. Apps. E and F). Unions representing the lay faculties at these schools won the elections, and the Board certified the Unions as bargaining representatives. On First Amendment grounds Respondents declined to bargain, and the Board issued complaints charging them with violations of Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§158(a)(5) and (1). The Board then summarily rejected Respondents' First Amendment contentions, found that they committed unfair labor practices and ordered them to bargain with the Unions. (Cert. Pet. Apps. C and D).

Upon Petitions for Review and Enforcement, the Court of Appeals for the Seventh Circuit held that the First Amendment barred the Board from asserting jurisdiction over Respondents' religious schools. (Cert. Pet. App. A)[2] Relying primarily on this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975) and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Court of Appeals set aside and denied enforcement of the Board's orders to bargain. The Court of Appeals found that in adjudicating disputes at religious schools, the Board had become, and in the future would continue to be, entangled in matters of religious doctrine and practice.

Petitioner seeks review of this decision.

[2] The Court of Appeals' opinion is reported at 559 F.2d 1112. The Board's orders to bargain are reported at 224 NLRB 1221 and 224 NLRB 1226.

REASONS FOR DENYING THE WRIT

The Board's petition for certiorari does not and cannot claim that there is any conflict between the circuits, and we submit that there are no other reasons warranting exercise of this Court's review power. This Court has long held that Government intervention into religious schools offends the Religion Clauses of the First Amendment when such intervention impairs religious doctrine or disciplinary practices. *See, e.g., Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). The Seventh Circuit merely applied these well-established principles to halt the Board's attempted intrusion into the faculty relations at the Quigley seminaries and the Fort Wayne-South Bend diocesan high schools. The Board's petition claims that the Seventh Circuit is wrong as a matter of First Amendment law. But the Board's petition does not explain how the Board will resolve labor disputes without becoming entangled in religious controversy. We submit that the Board is silent because it has no answer.

The simple issue here is whether the Labor Board's ongoing adjudication of labor disputes at religious schools impermissibly entangles the Government in the affairs of the Church. *Lemon* v. *Kurtzman* and its progeny teach that the resolution of this issue requires an analysis of three factors: (1) the character and function of the religious institutions at issue, (2) the nature of the Government's intervention, and (3) the resulting relationship between Church and State. *Lemon* v. *Kurtzman,* 403 U.S. 602, 615 (1971). Review of these factors and the record readily demonstrates that the Seventh Circuit correctly decided this case.

I. CHARACTER AND PURPOSE OF THE SCHOOLS

Constitutional scrutiny of the Board's actions begins with the uncontrovertible fact that the Quigley seminaries and the Fort Wayne-South Bend high schools are religious institutions. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975). As the Court observed in *Lemon*:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn. 403 U.S. at 625.

The Seventh Circuit did not hold and we do not contend that all Government contacts with religious schools are constitutionally proscribed. This Court's decisions and common sense make plain that certain neutral contracts are unquestionably permissible. The Government, for example, can and must provide police and fire protection as well as certain welfare benefits to parochial school children. *E.g., Wolman* v. *Walter,* 97 S.Ct. 2593 (1977); *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Everson* v. *Board of Education,* 330 U.S. 1 (1947). By no stretch of the imagination can the Board's wholesale regulation of the collective bargaining and labor-management relations of teachers be equated with such neutral contacts.

Throughout this litigation, the Board has ignored the fact that this case concerns teachers. No First Amendment objection is raised here to the Board's possible assumption of jurisdiction over janitors or similar employees. Teachers, however, are the very heart of church-school education, for it is they who are required to make a professional

commitment to the school's religious goals and objectives in imparting a religious heritage to students. *Lemon* v. *Kurtzman,* 403 U.S. 602, 617-19 (1971). Because they are in a unique position to influence the hearts and minds of their pupils, there is an undeniable and ever present peril that under the protective umbrella of a Government-sanctioned union, some teachers may flout religious authority at the expense of the religious mission of the Church's schools.

In short, the fundamental religiosity of the schools and the sensitive role of the teacher in their regimen give "rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Lemon* v. *Kurtzman,* 403 U.S. 602, 616 (1971).

II. GOVERNMENT INTERVENTION

The Government's intervention in the internal affairs of parochial schools in the school-aid cases was relatively unobtrusive. Both the financial aid programs before the Court in *Lemon,* for example, required the Government merely to review parochial school records and to determine whether certain monies were spent on religious activity. *Lemon* v. *Kurtzman,* 403 U.S. 602, 620-22 (1971). Yet this Court held that such state action constituted impermissible entanglement:

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted 'the hazards of government supporting churches' in *Walz* v. *Tax Commission, supra,* at 675, and we cannot ignore *the danger that pervasive modern governmental power will ultimately intrude on religion* and thus conflict with

> the Religion Clauses." 403 U.S. at 620 (emphasis supplied).

This passive state involvement in religious schools pales when compared to the active investigation and adjudication regarding teachers that would attend Labor Board regulation here. Dismissal of a teacher for teaching a doctrine that has currency with the public at large but is totally at odds with the tenets of the Roman Catholic Faith is the paradigm. However competent a teacher may otherwise be, failure to respect Catholic doctrine in the classroom cannot be countenanced by Church authority. If the discharged teacher should file an unfair labor practice charge with the Board and if the Board sustains the charge, a school may be forced to reinstate a person guilty of heretical teaching. *See* 29 U.S.C. §§158 and 160.

Signally, in this case the Board has engaged in the very "kind of state inspection and evaluation of the religious content of a religious organization" condemned in *Lemon.* The record in the Quigley case is replete with striking examples of such protracted and searching inquiry. (*See e.g.,* Cert. Pet. App. A at 20a n.11). And the Fort Wayne-South Bend high schools have already been the subject of unfair labor practice charges raising questions of morality and obedience to religious authority. (*See, e.g.,* Cert. Pet. App. A at 33a-34a)

Thus the Seventh Circuit did not engage in idle speculation as the Board suggests. The camel's nose was well in the tent and the beast was upon us.

III. THE RELATIONSHIP BETWEEN THE GOVERNMENT AND THE CHURCH

The Board seeks the role of an ongoing arbiter of teacher labor disputes at Respondents' schools. The National Labor

Relations Act provides a forum for the protection and adjudication of employee self-interests. 29 U.S.C. §§157, *et seq.* The Act establishes standards for employee-employer behavior and elaborate procedures for the selection of union representatives, 29 U.S.C. §§158, 159, and vests the Board with extensive investigatory powers, 29 U.S.C. §161, to enforce the ongoing substantive mandates of the Act. 29 U.S.C. §160. Administrative regulations and a voluminous and ever-growing body of case law impose still more extensive and varied regulation. The intimate and continuing Government interference that inheres in this scheme is precisely what the Court struck down in *Lemon,* and *Lemon's* entanglement is plainly *de minimis* compared to that found here.

The Court's recent decision in *State of New York* v. *Cathedral Academy,* 46 U.S.L.W. 4023 (U.S. December 6, 1977), confirms this analysis. *Cathedral Academy* invalidated a program of financial aid to private schools on entanglement grounds because the program required a *one-time determination* of the secular character of certain reimbursable expenses. *Cathedral Academy* holds:

> But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims

> would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once. 46 U.S.L.W. at 4025.

If such a one-time audit is impermissible, then surely the Board's pervasive regulation proposed here offends the First Amendment.

Indeed, even the Board's attorney conceded at argument before the Seventh Circuit that the Board would have to inquire into the religiosity of the Bishop's actions and seek to accommodate the Church's religious goals. (Cert. Pet. App. A at 40a) But, as *Cathedral Academy* affirms, this presents precisely the constitutional dilemma the Religion Clauses seek to avoid. On the one hand, if the Board divines the theological bases for the Bishop's action and reinforces his authority in a labor dispute, the Board will impale itself on the Establishment Clause. *E.g., Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). On the other, if the Board ignores theological concerns and resolves disputes strictly on industrial standards, it will transgress the Free Exercise Clause. *E.g., Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696 (1977). There is no middle ground, and in either event when the controversy comes to the courts, the courts will themselves have to doff their judicial robes and don cassock and miter to untangle the theological knots before them.

These principles apply *a fortiori* to the Quigley seminaries. No one can question that the clergy are the lifeblood of any church. *McClure* v. *Salvation Army,* 460 F.2d

553, 558-59 (5th Cir. 1972), *cert. denied,* 409 U.S. 896. If the Quigleys are unable to attract young men to a clerical vocation and educate them in an atmosphere and manner that is fully in accord with the tenets of the Catholic Church, the ability of the Church to propagate and sustain its faith will be seriously, perhaps irreparably, impaired.

Accordingly, the Seventh Circuit's application of the governing law is unassailable, and there is no cause for this Court's review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's petition for a writ of certiorari should be denied.

Respectfully submitted,

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